INDEX

CITATIONS

-624—73——1

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-5521

CLARENCE EUGENE STRUNK, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (App. 16–22) is reported at 467 F.2d 969.

JURISDICTION

The judgment of the court of appeals (App. 22) was entered on August 16, 1972. On September 7, 1972, the court denied a petition for rehearing (App. 24). The petition for a writ of certiorari was filed on October 5, 1972; it was granted on January 8, 1973. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals, having concluded that petitioner was denied his constitutional right to a speedy trial because the ten-month delay in bringing him to trial prejudiced his ability to have that portion of his federal sentence run concurrently with his pre-existing state sentence, could properly fashion a remedy to cure the particular prejudice, by ordering credit on his federal sentence, rather than ordering the dismissal of the indictment.

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, * * *.

STATEMENT

Following a trial by jury in the United States District Court for the Eastern District of Illinois, petitioner was convicted of transporting a motor vehicle in interstate commerce, having knowledge that it was stolen, in violation of 18 U.S.C. 2312 (the Dyer Act). He was sentenced on May 4, 1971, to five years' imprisonment, the term to run concurrently with a one-to-three year sentence he was then serving in the Nebraska State Penal Complex for an unrelated state offense.[1] The court of appeals affirmed the conviction,

[1] On July 24, 1969, petitioner was arrested by state authorities in Nebraska and held in custody on a charge of burglary. Following a guilty plea in the Nebraska state court to the reduced charge of grand larceny, he was sentenced in September 1969 to a one-to-three year prison term (App. 14).

but remanded to the district court with instructions that the sentence be modified by crediting petitioner with the nine-month period elapsing between the indictment and the arraignment (App. 16–22).

The material facts are essentially as set forth in the opinion below and are not here in dispute. On June 30, 1969, petitioner entered Steinman Motor Co., an automobile dealership in Oconomowoc, Wisconsin, and spoke with the owner and a sales manager about purchasing an Oldsmobile Cutlass station wagon. Upon being advised that petitioner had an injured leg and needed a hand-operated switch to dim the headlights, the salesmen suggested that petitioner examine one of the cars on the lot having a dimmer switch. Without permission, petitioner drove the car off the lot when no one was watching and did not return. The automobile was later found on July 11, 1969, parked in a Ford dealer's car lot in Mount Vernon, Illinois (Tr. 5–12, 33–36, 45–52, 67).[2]

Petitioner was interrogated about the stolen vehicle by F.B.I. Agent Kinsey on September 3, 1969, the day after he had been sentenced on his guilty plea in the Nebraska state court (n. 1, *supra*); at the time he was in the local jail in Alliance, Nebraska (Tr. 78–85). After being advised of his constitutional rights, petitioner signed a waiver form[3] and then admitted to Agent Kinsey that he had taken the car without permission and driven it from Wisconsin to Mount

[2] "Tr." references are to the transcript of the trial proceedings, a copy of which is on file with the Clerk of this Court.

[3] Petitioner used the alias "Albert Garner Wagner" when he signed the waiver form (Tr. 80).

Vernon, Illinois, where he had abandoned it near an automobile dealership (Tr. 82–83, 98–99). Petitioner also told the agent that "it was his intention to demand a speedy trial under Rule 20 in the District of Nebraska and that is why he wanted to get this case cleaned up * * *" (Tr. 81).

Petitioner was not arrested, taken into federal custody, or made the object of a federal complaint under Rule 3, Fed. R. Crim. P. On December 17, 1969, the United States Attorney for the Eastern District of Illinois was advised by the Federal Bureau of Investigation and the United States Attorney for the District of Nebraska that petitioner wished to enter a plea of guilty or *nolo contendere* to a federal Dyer Act charge, pursuant to Rule 20, Fed. R. Crim. P. (App. 14).[4] Forms for waiving indictment and for consenting to plead under Rule 20 were then mailed, with other necessary papers, to the office of the United States Attorney in Nebraska, where petitioner was confined in the state prison (*ibid.*).

These forms were not returned, and on May 26, 1970, the United States Attorney for the Eastern District of Illinois, having received no further word with regard to the proposed plea under Rule 20, presented the case to the grand jury and the present indictment was returned (App. 14). Thereafter, on August 13,

[4] Rule 20 authorizes the transfer of a case from a district in which a criminal charge is pending (whether or not an indictment or information has been filed) to be disposed of in another district where the defendant has been arrested or is being held, if the defendant states in writing that he wishes to plead guilty or *nolo contendere* and if the respective United States Attorneys consent.

1970, the Illinois prosecutor was informed by the United States Attorney in Nebraska that petitioner had refused to enter a plea under Rule 20 and had indicated he would raise the issue of a speedy trial (App. 15). The Nebraska office received a letter from petitioner eleven days later in which it was suggested that "timeliness in advancing the charge seems to be lacking" (*ibid.*).

On February 9, 1971, nine months after the return of the indictment, petitioner was brought to the United States District Court for the Eastern District of Illinois pursuant to a writ of habeas corpus *ad prosequendum* to be arraigned.[5] He entered a plea of not guilty and trial was set for March 29, 1971. Pretrial motions to dismiss the indictment because of insufficient evidence before the grand jury and because of failure to grant a speedy trial were denied after a hearing on March 18, 1971. At his trial, petitioner did not take the stand and presented no affirmative defense; he was convicted in a one-day trial on March 29, 1971.

The court of appeals affirmed the conviction, but it remanded the case to the district court with instructions to modify petitioner's sentence (App. 16–22). The remand order was based on the court's finding that the delay of 259 days between the time of indictment and the time of arraignment constituted, in the context of this particular case, a violation of peti-

[5] No detainer had been filed against him by federal authorities prior to his trial, and the execution of the writ of habeas corpus was apparently the first time petitioner learned that he had actually been indicted (App. 15, 20).

tioner's right to a speedy trial under the Sixth Amendment. Petitioner conceded in the court of appeals "that the delay in bringing * * * [him] to trial did not cause any prejudice with respect to the defense of the case" (App. 20). The sole prejudice claimed by petitioner lay "in delaying the commencement of his federal sentence," thereby depriving him of an opportunity to serve a greater portion of his federal sentence concurrently with the state sentence he was already serving (App. 20–21). The court of appeals concluded that petitioner had been unconstitutionally denied that opportunity; even though it termed the loss of this credit a denial of the Sixth Amendment right to a speedy trial, the court determined that relief "less drastic" than dismissal of the indictment was appropriate (App. 21–22). It therefore chose "to treat the sentence * * * as illegal to the extent of the delay we have characterized as unreasonable" (App. 22). On remand, the district court was directed to enter an order, under Rule 35, Fed. R. Crim. P., "instructing the Attorney General to credit the defendant with the period of time elapsing between the return of the indictment and the date of the arraignment" (*ibid.*).[*] Petitioner contends in this Court that the court of appeals was obliged to order his complete discharge rather than a "compensatory" reduction of his sentence (Pet. Br. 12).

[*] The district court subsequently ordered the Attorney General to give petitioner credit for 259 days on the sentence (App. 23).

RGUMENT

TION AND SUMMARY

I. INTRODUC

In its present postu re, this case presents a novel issue that has not been addressed in earlier decisions— the permissible remedy for dealing with violations of the Sixth Amendment right to a speedy trial. The issue did not arise whe it was generally assumed that the denial of a speedy trial was synonymous with un- just interference with t he accused's ability to mount a defense. Under that t raditional approach, a single remedy was naturally assumed to follow automati- cally—dismissal of the charges against the accused. With this Court's recen t decision in *Barker* v. *Wingo*, 407 U.S. 514, however, announcing the application of a more flexible standard in evaluating speedy trial claims, the question raised here concerning the na- ture of the relief that can properly be accorded upon finding an infringement of this constitutional right has surfaced.

The court below, having reached the conclusion that the *Barker* criteria tipped the balance in petitioner's favor on the speedy trial issue, held that the tradi- tional remedy of dismissal of the indictment—which this Court in *Barker* termed an "unsatisfactorily severe remedy" (407 U.S. at 522)—would be "in- appropriate" (App. 2) in the particular circum- stances of this case and instead ordered "less drastic relief" (App. 21). Whil e the court's finding of a Sixth Amendment violation is, in our view, dubious on

this record, we do believe that, if that determination is accepted *arguendo,* the remedy fashioned by the court of appeals is a proper, proportioned response to the infringement it found to exist.

In this regard, it will aid our discussion of the "remedy" issue involved here if we first take a brief look at the nature of the alleged constitutional violation that prompted the questioned relief. The Sixth Amendment guarantee of a "speedy trial" is, as this Court pointed out in *Barker* (407 U.S. at 519), "generically different from any of the other rights enshrined in the Constitution for the protection of the accused." It is, as has been so often emphasized, "necessarily relative," securing rights to a defendant without precluding the rights of public justice. *Beavers* v. *Haubert,* 198 U.S. 77, 87; *United States* v. *Ewell,* 383 U.S. 116, 120. Because of the "amorphous quality" of this constitutional safeguard (*Barker* v. *Wingo, supra,* 407 U.S. at 522), the Court stressed in *Barker* (*ibid.*) that "any inquiry into a speedy trial claim necessitates a functional analysis of the right in the particular context of the case." Whether or not a Sixth Amendment violation has occurred turns on "a difficult and sensitive balancing process" (*id.* at 533) involving four related factors: "Length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant" (*id.* at 530).

Length of delay, of course, is the key criterion: "Until there is some delay which is presumptively prejudicial, there is no necessity for inquiring into the other factors that go into the balance." *Barker* v. *Wingo, supra,* 407 U.S. at 530. In the present case,

the length of the delay between indictment and trial was approximately ten months.[7] While such a period of inactivity would ordinarily not be sufficient to cause concern or to suggest "presumptive prejudice," it is relevant that this was a simple prosecution for interstate transportation of a stolen automobile. See *Barker* v. *Wingo, supra,* 407 U.S. at 531. On the other hand, this case was not one dependent upon eyewitness testimony or memories that might appreciably fade in a few months (compare *United States* v. *Butler,* 426 F. 2d 1275, 1277 (C.A. 1)); accordingly, the lapse of time here does not alone raise a presumption of a speedy trial violation. Nevertheless, the court below considered the delay sufficient to act as a "triggering mechanism" within the meaning of *Barker* necessitating inquiry into the other factors, for the simple reason that petitioner's state sentence was running all during the period the federal indictment remained untried.

No claim is made here that the prosecutor intentionally delayed petitioner's trial "to gain some tactical advantage over [him] or to harass him." *United States* v. *Marion,* 404 U.S. 307, 325; and see *Pollard* v. *United States,* 352 U.S. 354, 361. The United States Attorney in Illinois explained that he took no action for the first two and a half months after indictment because petitioner had indicated that he was going to enter a plea to the federal charge under Rule 20,

[7] The eleven-month interval between the commission of the crime and indictment is not challenged here (App. 18). See *United States* v. *Marion,* 404 U.S. 307. In addition, the court of appeals held that the one month delay between arraignment and trial was not unreasonable (App. 19).

Fed.R.Crim.P.; indeed, arrangements had already been made to permit him to do that in Nebraska (App. 19–20). When it became apparent that petitioner had decided against a Rule 20 plea, the failure to set an immediate date for arraignment was attributed to the fact that the office of the United States Attorney was at the time "understaffed" (App. 20); the limited work force and the need to use available manpower on active cases commanding a higher priority resulted in approximately six months' more delay before arraignment and an additional month before trial.

During this period, petitioner did object to the fact that his case was not being handled more expeditiously (App. 15). On this record, however, it cannot be determined whether he declined to press his objection by demanding a speedy trial in order not to lose the possible advantage of later using the government's delay to defeat his prosecution for a crime to which he had already confessed (*supra*, pp. 3–4).[8] Since he was lawfully in prison for another offense, and was apparently unaware of the return of the federal indictment until removed from state custody for arraignment a month before trial, petitioner clearly did not share many of the concerns that often confront an accused awaiting trial. The delay did not "seriously interfere with [his] liberty * * *, disrupt his employment, drain his financial resources, curtail his associations, subject him to

[8] The record does not reveal whether, prior to his arraignment on the federal charge, petitioner was in communication with counsel in Nebraska who represented him on the state charges.

public obloquy, [or] create anxiety in him, his family and his friends." *United States* v. *Marion, supra,* 404 U.S. at 320; and see *Klopfer* v. *North Carolina,* 386 U.S. 213, 221–226; *United States* v. *Ewell, supra,* 383 U.S. at 120. Nor was there any real likelihood in the circumstances of this case that a lapse of time would in any way prejudice his defense, and it has been conceded that there was no such prejudice (App. 20).

Indeed, petitioner's only interest in expeditious treatment was to receive an early sentence on the federal charge, which he hoped would be allowed to run concurrently with the state sentence he was already serving. But petitioner was not entitled to concurrent sentences as a matter of due process. The imposition of sentence following a conviction is within the broad discretion of the federal district judge. See *United States* v. *Tucker,* 404 U.S. 443, 446–447. As pointed out by the court below (App. 21), in the case at bar the sentencing court could "have postponed commencement of [petitioner's] federal sentence until after he had served his state sentence." The fact that it did not do so, moreover, but instead made the sentence partially concurrent with the sixteen months remaining on the one-to-three year sentence petitioner was then serving, might well have actually been designed to compensate him for his pretrial confinement.[9] It is therefore far from clear that

[9] This case does not present the situation referred to in *Smith* v. *Hooey,* 393 U.S. 374, 377, where the possibility of receiving at least a partially concurrent sentence is "forever lost" because of the inordinate delay in bringing the pending case to trial. Even in such circumstances, however, the alleged prejudice to the defendant is cured if the sentence imposed is

petitioner suffered prejudice of any sort as a result of the ten-months' delay between indictment and trial.[10]

The court of appeals thought otherwise. "After balancing the various factors outlined in [*Barker* v.] *Wingo*," it stated (App. 21), "we conclude that the defendant was denied a speedy trial to his prejudice." Even assuming *arguendo* that the court below struck the proper balance, we disagree with petitioner that the only possible remedy on such a finding in *these* circumstances is dismissal of the indictment. We believe that the courts can properly enforce the constitutional protection in this area, as they have in other areas, by tailoring the remedy to the particular infringement that needs to be cured. By modifying

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reduced by the sentencing judge by a length of time commensurate with that part of the already served sentence that the judge could have otherwise made to run concurrently.

[10] If this Court should conclude on a balance of the four factors in *Barker* that the present circumstances—an explained ten-months' delay resulting in virtually no prejudice to defendant—do not establish a speedy trial violation, we think it can properly affirm the judgment below. While such a disposition would necessarily leave standing the court of appeals' modification of sentence, the government has filed no cross-petition challenging that ruling. Compare, *Brennan* v. *Arnheim and Neely, Inc.*, No. 71-1598, decided February 28, 1973, slip op. 4–5; *National Labor Relations Board* v. *Express Publishing Co.*, 312 U.S. 426, 431. Petitioner would, of course, have no cause to object to the present sentence under the court of appeals' remand order if this Court affirmed on the ground that there was no Sixth Amendment violation here, since such a disposition of the case would leave him with more than he was legally entitled to.

petitioner's sentence in this case to credit him for the period that elapsed between indictment and arraignment, the court of appeals has, we submit, vindicated the interests both of society and of the accused that are served by the right to a speedy trial, without in any way compromising the effective enforcement of this "fundamental" right (*Klopfer* v. *North Carolina, supra,* 386 U.S. at 223, 226) in this case or in future ones.

II. EVEN ASSUMING AN INFRINGEMENT OF PETITIONER'S SIXTH AMENDMENT RIGHT TO A SPEEDY TRIAL, THE RELIEF ACCORDED BY THE COURT OF APPEALS WAS PROPER

Traditionally the remedy associated with a violation of the constitutional right to a speedy trial has been dismissal of the indictment. In the context of what this and other federal courts have heretofore held to be an impermissible delay under the Sixth Amendment, such relief seems entirely appropriate. The constitutional infringement in past cases has essentially been based on a finding of undue prejudice to the defendant's ability to mount a defense, which either has been presumed because the inordinate lapse of time would necessarily have caused memories to fade or fail (*Petition of Provoo,* 17 F.R.D. 183 (D. Md.), affirmed, 350 U.S. 857; cf. *Klopfer* v. *North Carolina, supra*), or has been actually established on a showing of the death or unavailability of witnesses and the loss of material records (*Dickey* v. *Florida,* 398 U.S. 30; *United*

States v. *Mann,* 291 F. Supp. 268 (S.D.N.Y.).[11] By contrast, where such prejudice to the defense of the case has not been present, this Court has upheld the delay as constitutionally permissible. See *United States* v. *Ewell, supra,* 383 U.S. at 120; *Barker* v. *Wingo, supra,* 407 U.S. at 534.

Thus, in such situations, whatever interests society might otherwise have in pressing a particular prosecution, those interests are deemed outweighed by the injury to the accused if a trial is permitted to go forward or if a conviction is permitted to stand. The remedy of dismissal is dictated by the very nature of the constitutional violation that has been found to exist. And it is in this context, we believe, that this Court made the statement in *Barker* (407 U.S. at 522) that dismissal "is the only possible remedy."

But it does not follow, we submit, that the same remedy—one which the Court in *Barker* characterized as "unsatisfactorily severe" (407 U.S. at 522)—must be rigidly applied in all cases involving a denial of the constitutional right to a speedy trial. To the extent that the "balancing process" outlined in *Barker* interjects flexibility into the determination of what constitutes a Sixth Amendment violation, there should be similar flexibility in fashioning relief that is correlative with the infringement found. The Constitution does not by its terms preclude such an approach; as long as the relief granted in the particular circum-

[11] In such circumstances, it has been noted that, quite apart from speedy trial considerations, fundamental notions of due process would eliminate the possibility of a fair trial. See *Dickey* v. *Florida, supra,* 398 U.S. at 38–39 (Harlan, J., concurring).

stances affords adequate protection to the several interests served by the speedy trial guarantee, the constitutional command is fully implemented.

In arguing for a disposition less drastic than outright dismissal in appropriate cases, we urge no more than that the Court use the same flexibility in enforcing the Sixth Amendment right involved here that it has heretofore used to enforce other constitutional rights. In *Weeks* v. *United States,* 232 U.S. 383, for example, the Court responded to a clear infringement of the right to be secure from unreasonable searches and seizures under the Fourth Amendment by fashioning an exclusionary rule calling for suppression of the illegally obtained evidence. See also *Mapp* v. *Ohio,* 367 U.S. 643. The Court, however, has determined that the Fourth Amendment values protected by the exclusionary rule do not require that such evidence be inadmissible in all circumstances, but only that it cannot be used against a person whose rights were actually violated. See, *e.g., Alderman* v. *United States,* 394 U.S. 165, 171–176; *Wong Sun* v. *United States,* 371 U.S. 471, 492. Similarly, in disposing of a Fifth Amendment claim of self-incrimination based on the possible use in a tax evasion prosecution of prior statements made by the accused taxpayer, the Court ruled, in *United States* v. *Blue,* 384 U.S. 251, 255, that the appropriate remedy would be to suppress the evidence and its fruits, not to bar the prosecution altogether. In *Miranda* v. *Arizona,* 384 U.S. 436, in order to vindicate various constitutional rights, the Court formulated an exclusionary rule barring the use of incrimi-

nating statements made by an accused during custodial interrogation if he has not first been advised of those constitutional rights. But this remedy was qualified in *Harris* v. *New York*, 401 U.S. 222, to permit the use of such statements, not on the government's case in chief, but for purposes of impeachment. And in *Murphy* v. *Waterfront Commission*, 378 U.S. 52, the Court, having held the Fifth Amendment privilege against self-incrimination applicable to the States through the Fourteenth Amendment (*Malloy* v. *Hogan*, 378 U.S. 1), implemented the constitutional privilege by formulating its own "use immunity" rule, barring the federal government from using incriminating testimony compelled from state witnesses, or the fruits thereof.[12]

What these cases illustrate is that the Constitution leaves room for the courts to fashion and adjust appropriate remedies for constitutional violations, especially when the violations themselves involve newly developed or recently re-focused constitutional principles.[13]

In like manner, if a Sixth Amendment violation can indeed be found to exist on the facts of this case,

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[12] The decision in *Murphy* overruled *Feldman* v. *United States*, 322 U.S. 487, which allowed the use of testimony compelled in exchange for a grant of state immunity to secure a conviction for a federal offense.

[13] By analogy, judicial development of the harmless error rule was to allow courts "to discontinue using reversal as a 'necessary' remedy for particular errors and to 'substitute judgment for the automatic application of rules * * *'" (*Chapman* v. *California*, 386 U.S. 18, 48–49 (Harlan, J., dissenting)).

this Court, rather than mechanically ordering dismissal of the indictment, can properly approve a remedy tailored to the peculiar circumstances presented. As we have pointed out, the delay here resulted in no prejudice to petitioner in terms of oppressive pretrial incarceration or impairment of his defense, two of the three evils which the speedy trial right is designed to protect against. See *United States* v. *Ewell, supra,* 383 U.S. at 120. To the extent that the third form of prejudice to the accused—*i.e.,* anxiety and concern caused by pretrial delay (*ibid.*)—was at all implicated, it is agreed that petitioner's concern related only to the time lost in commencing his federal sentence. The court of appeals thus fashioned a remedy to cure the only prejudice that was claimed. By giving petitioner credit on his maximum five-year federal sentence for the period that elapsed between indictment and arraignment, the court fully vindicated the interests the court found adversely affected in violation of the speedy trial clause, and it did so in a manner which even petitioner suggested would be appropriate in his briefs below.[14]

Nor do the societal interests served by this constitutional safeguard (see *Barker* v. *Wingo, supra,* 407 U.S. at 519–521) require more drastic relief in the

[14] In the conclusion to both his main brief and his reply brief in the court below, copies of which are on file with the Clerk of this Court, petitioner urged as alternative relief on finding a speedy trial violation that the court could "set aside the original sentence imposed with instructions that a new sentence be imposed, taking into consideration the delay complained of in this case."

present context. "The public is concerned with the effective prosecution of criminal cases, both to restrain those guilty of crime and to deter those contemplating it" (*Dickey* v. *Florida, supra,* 398 U.S. at 42–43 (Brennan, J., concurring)). The delay involved here did not under the circumstances "reduce the capacity of the government to prove its case" (398 U.S. at 42), as the court below expressly noted (App. 21). It also imposed none of the burdens on society that are usually associated with pretrial incarceration (see *Barker* v. *Wingo, supra,* 407 U.S. at 520–521), since petitioner was lawfully in prison in Nebraska on a state conviction during the entire period. And finally, because we do not deal here with deliberate government delay designed to obtain an advantage over the accused, there is no call for the heavy-handed treatment urged by petitioner which might in other circumstances be warranted to "penaliz[e] official abuse of the criminal process and discourag[e] official lawlessness" (*Dickey* v. *Florida, supra,* 398 U.S. at 43 (Brennan, J., concurring). Rather, in these special circumstances, assuming *arguendo* a constitutional violation, we agree with the court of appeals that "the societal interest in trying people accused of crime, rather than granting them immunization because of legal error * * *" (*United States* v. *Ewell, supra,* 383 U.S. at 121), is best served by fashioning a new sentence to cure the possible prejudice caused by the delay, much the same as this Court contemplated in *Ewell* (383 U.S. at 123).

In his brief in this Court, petitioner recognizes the care and precision manifested by the court of appeals

in fashioning a remedy: "And so the court [of appeals] decided that the proper remedy was to give back to the Petitioner what the Government, by its unreasonable delay in bringing him to trial, had taken away—259 days" (Pet. Br. 12). "The remedy was clearly compensatory," he conceded (*ibid.*), but asserts that it was error merely to "compensate" him for the infringement that was found to have taken place. Prior decisions of this Court, discussed above, however, show clearly that the correct approach in fashioning a remedy for a particular defendant is to try to restore him to the position in which he would have been if the objectionable conduct had not taken place, rather than to penalize society by giving him complete amnesty. Only last Term the Court upheld the constitutional sufficiency of a grant of "use immunity," in lieu of the complete "transactional immunity" sought, in compelling testimony over a claim of Fifth Amendment privilege; the explicit rationale was that the more limited immunity "leaves the witness and the prosecutorial authorities in substantially the same position as if" the witness had been allowed to stand on his constitutional privilege. *Kastigar* v. *United States,* 406 U.S. 441, 462.

The same attempt to provide redress to the defendant rather than to visit retribution on the government and the public should apply in speedy trial cases. If there has been irretrievable prejudice to the accused's ability to defend himself because of an unreasonable delay in bringing him to trial, the traditional remedy of dismissal of the charges may be the

only available one, since by hypothesis his presumption of innocence and right to be free of unjust conviction have been illegally denied and cannot readily be rectified in any other way.[15] In the present case, however, the peculiar nature of the Sixth Amendment violation found made it practicable and just to restore petitioner's "right"—by giving him back the only thing he could possibly have lost by reason of the delay, that is, the opportunity to have nine more months of his federal sentence served concurrently with the state sentence he was in any event serving.

Petitioner suggests several reasons why such a disposition is unsatisfactory. First, he argues that the court of appeals' formulation of a remedy less drastic than dismissal—one which left standing the judgment of conviction—was primarily motivated by the guilty verdict, which the court could not properly consider. This argument misapprehends the significance of the court's reference to the sufficiency of the evidence (App. 21). In discussing the remedy to be fashioned, the court of appeals pointed out simply that the ten-month delay affected neither the government's capacity to prove its case (see *Dickey* v. *Florida, supra,* 398 U.S. at 42 (Brennan, J., concurring)) nor the defendant's ability to present a defense (*Barker* v.

[15] A situation could be posited in which even prejudice to the defense need not necessarily lead to an absolute discharge. If, for example, the only prejudice was the absence from the country of a key defense witness because of trial delays, the return of the witness might make a new trial, rather than dismissal of the indictment, the proper remedy. Of course in deciding that question a court would have to weigh all of the other factors and interests described in *Barker* v. *Wingo.*

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presenting his defense."

Thus, rather than ordering outright dismissal of the indictment, the district court in such circumstances could have allowed the case to go to trial, but ruled that, in the event of conviction, petitioner would be given credit on his sentence for the impermissible delay.[17]

Petitioner also argues that the remedy devised in this case is "too forgiving of carelessness, sloth, and negligence on the part of Government prosecutors" (Pet. Br. 14). But it is not the function of the speedy trial right to act as a disciplinary measure in all cases of unexcused delay. As we have already pointed out, the underlying purpose of the constitutional guarantee is to protect the various interests which society and the accused have in a prompt disposition of pending prosecutions. To that end, the remedy fashioned in response to a denial of a speedy trial should relieve the accused of the prejudice he has suffered as a result of the impermissible delay, while simultaneously accommodating to the fullest extent possible society's interest in the effective prosecution of criminal cases.

In many situations where a balancing of the four factors outlined in *Barker* indicates a Sixth Amendment violation, dismissal of the indictment may be the only appropriate relief. Two obvious examples are where the delay impedes the accused's ability to de-

[17] This approach is similar to the one required by federal statute (18 U.S.C. 3568) for an accused who, unlike petitioner, has been detained in federal custody prior to trial solely because he was denied release on bond. Under the statute, he is entitled to credit on his federal sentence for the period of his confinement while awaiting trial on that charge.

fend himself or where it is used by the prosecutor as an intentional device to gain tactical advantages. Cf. *United States* v. *Marion, supra*, 404 U.S. at 324. But occasionally, as in the present case, the circumstances of the delay, and its minimum prejudical effect, may well be such that the drastic remedy of dismissal is both disproportionate to the harm suffered by the accused and inconsistent with the societal interest in proceedings with the trial.[18] We urge only that in such instances the courts be permitted to tailor the remedy to fit the constitutional violation.

Nor, we submit, is there any substance to petitioner's position that the injection of this amount of flexibility into the remedial aspects of the Sixth Amendment speedy-trial inquiry will encourage prosecutors to give low-priority treatment to cases of the sort involved here. Delay in any criminal case carries with it the potential of prejudicing either the defense or the prosecution, or both. To the extent that the delay becomes constitutionally impermissible, it will always present a real possibility that the indictment will be dismissed. The fact that a court might in exceptional circumstances fashion less drastic relief on finding a speedy trial violation does not remove this spectre of dismissal, and thus prosecutors can ill-afford to take the calculated risk suggested by petitioner.

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[18] Compare *Illinois* v. *Somerville*, No. 71-692, decided February 27, 1973, holding that the absence of definable prejudice and the "ends of public justice" precluded a finding that the double jeopardy clause of the Fifth Amendment barred a retrial.

There are, moreover, other factors which, as a practical matter, guard against prosecutorial inertia. Rule 48(b) of the Federal Rules of Criminal Procedure authorizes dismissal of a criminal case if the district court finds that there has been "unnecessary delay" in securing an indictment or in bringing a defendant to trial, even in the absence of a constitutional denial of speedy trial. See *Mann* v. *United States,* 304 F. 2d 394 (C.A.D.C.). In addition, under Rule 50(b), as recently promulgated, district courts are in the process of devising plans for minimizing undue delay and insuring prompt disposition of criminal cases.[19] Furthermore, it is within the power of the accused himself to demand a speedy trial if he is dissatisfied with the pace at which his case seems to be proceeding. See *Barker* v. *Wingo, supra,* 407 U.S. at 528–529. In these circumstances, the theoretical suggestion that prosecutors might interpret the decision below, if left undisturbed, as removing all impetus to proceed with responsible promptness in certain types of cases is pragmatically unsound.

Accordingly, like the court below, "we know of no reason why less drastic relief [than dismissal of the indictment] may not be granted in appropriate cases" (App. 21). And, assuming *arguendo* that petitioner

[19] See also, American Bar Association, Project on Minimum Standards for Criminal Justice, *Speedy Trial* 14–16 (Approved draft 1968).

was denied his constitutional right to a speedy trial, this in our view is such a case.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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